No. 88-153

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY AND GULF OIL CORPORATION (NOW, BY CHANGE OF NAME, CHEVRON U.S.A. INC.),

Petitioners,

—vs.—

PHOENIX CANADA OIL COMPANY, LIMITED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:

Milton Sherman
Scott M. Berman
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Attorneys for Petitioners
Texaco Petroleum Company,
Ecuadorian Gulf Oil Company
and Gulf Oil Corporation
(now, by change of name,
Chevron U.S.A. Inc.)

LAWRENCE R. JERZ
2000 Westchester Avenue
White Plains, New York 10650

Attorney for Petitioner
Texaco Petroleum Company

Milton J. Schubin
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel of Record and Attorney
for Petitioners
Texaco Petroleum Company,
Ecuadorian Gulf Oil Company
and Gulf Oil Corporation
(now, by change of name,
Chevron U.S.A. Inc.)

July 25, 1988

QUESTIONS PRESENTED

1. Where the law of civil law countries governs, are federal courts free, because precedent assertedly is of less significance in such countries, to disregard the rulings of their highest courts and apply instead the federal court's own unprecedented notions of what the foreign law should be?

2. Where the Supreme Court of Ecuador determined that prejudgment interest is to be calculated on the basis of the interest rate in effect on the date the complaint is served, were the courts below free to reject that ruling because of the assumed "lack of precedential effect of judicial decisions in civil law jurisdictions" and make up their own different rule of Ecuadorian law (under which, instead of 8%, the interest rate increases to as much as 23%)?

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LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioners Texaco Petroleum Company, Ecuadorian Gulf Oil Company, and Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.) and respondent Phoenix Canada Oil Company, Ltd.*

The parent company of Texaco Petroleum Company is Texaco International Financial Company, which is wholly-owned by Texaco Overseas Holding, Inc. Texaco Overseas Holding, Inc. is wholly-owned by Texaco Refining and Marketing, Inc. Texaco Refining and Marketing, Inc. is wholly-owned by Texaco Inc. The only affiliate or subsidiary of Texaco Petroleum Company owned in part by entities or individuals outside the Texaco organization is Compania Texaco de Petroleos del Ecuador, C.A.

The parent company of Ecuadorian Gulf Oil Company is Trans Ocean Chevron Company, which is wholly-owned by Chevron Corporation. There are no affiliates and subsidiaries of Ecuadorian Gulf Oil Company owned in whole or part by entities or individuals outside the Chevron organization.

The parent company of Chevron U.S.A. Inc. is Chevron Corporation. The affiliates and subsidiaries of Chevron U.S.A. Inc. owned in part by entities or individuals outside the Chevron organization are as follows:

American Overseas Petroleum Limited
Arabian American Oil Company
Associated Octel Company Limited
Caltex Petroleum Corporation
Gaviota Gas Plant Company
Hong Kong Refuelling Company Ltd.

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* Texaco Inc. was originally a party to this action and participated in the trial. In April, 1987, it filed a petition seeking protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* Because of the automatic stay provided for in section 362 of the Bankruptcy Code, 11 U.S.C. § 362, the district court did not enter final judgment as to Texaco Inc. and it was not a party to the proceedings before the United States Court of Appeals for the Third Circuit.

Iranian Oil Participants Limited
P. T. Caltex Pacific Indonesia
Pembroke Capital Company Inc.
Stillwater Mining Company
Stillwater PGM Resources
Valley Pines Associates
Valley Venture Capital Fund Ltd. Partnership

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OCTOBER TERM, 1987

No. ____

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY AND GULF OIL CORPORATION (NOW, BY CHANGE OF NAME, CHEVRON U.S.A. INC.),

Petitioners,

—VS.—

PHOENIX CANADA OIL COMPANY, LIMITED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 842 F.2d 1466 and is reprinted as Appendix A to this petition. The Opinion of the United States District Court for the District of Delaware is reported at 560 F. Supp. 1372, and is reprinted as Appendix B.[1]

1 References to "A" are to Appendix A, the court of appeals opinion, references to "B" are to Appendix B, the district court opinion, references to "C" are to Appendix C, the affidavit of Dr. Miguel Andrade Varea sworn to December 9, 1986 and exhibits, references to "D" are to Appendix D, the letter opinion of Rene Bustamante Munoz dated June 11, 1985 and references to "E" are to Appendix E, excerpts from the affidavit of Michael A. Schwind sworn to July 29, 1983. Because of their length, the Appendices are separately bound. For the convenience of the Court, the pertinent excerpts from the two lower court opinions are attached to the Petition.

JURISDICTION

The original opinion of the United States Court of Appeals for the Third Circuit was entered on March 30, 1988. On April 26, 1988 the court entered an order denying the petition of plaintiff Phoenix Canada Oil Company, Ltd. for rehearing and rehearing *in banc* on issues not presented in this petition for writ of certiorari.[2]

This court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 44.1 of the Federal Rules of Civil Procedure provides in pertinent part:

> "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."

STATEMENT OF THE CASE

With the emergence of a world economy, federal courts increasingly are called upon to determine and apply foreign law. This case presents an issue of first impression that is fundamental to the performance of this role: the respect, if any, due an interpretation of the foreign law by the highest court of the foreign country.

The courts below explicitly acknowledged that the highest court of Ecuador had ruled on the issue of law in question and

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2 On the same day, the court of appeals entered an order slightly modifying its original opinion by replacing the first paragraph on page 13 of the slip opinion with a different paragraph. The court's modification appears in the printed copy of its opinion. (Appendix A.)

had determined that under Ecuadorian law the applicable prejudgment interest rate is that in effect when the complaint is filed, notwithstanding any subsequently adopted rate increase. (A24-25; B41.) Deciding that they could better interpret Ecuadorian law than the Supreme Court of Ecuador, the courts below fashioned a novel rule under which the elapsed time is broken into segments and subsequently adopted rates rather than the rate in effect at commencement of suit, are applied to later segments. (A24-25; B39-42.) The basis upon which the courts below concluded they were free to accord no respect to the Supreme Court of Ecuador is the purported "lack of precedential effect of judicial decisions in civil law jurisdictions." (A24-25; B41.)

Such an approach, respectfully, not only affronts the foreign country and its highest court, it fosters forum shopping and uncertainty to the point of lawlessness and denial of Due Process. Even assuming the dubious proposition that lower courts in civil law countries ignore their highest court's decisions brought to their attention, the result would be subject to review by the highest court. Where the forum is a United States court, and errors of foreign law cannot be corrected by the highest courts of the foreign country, it is critical that (absent extraordinary circumstances) the court be guided by the interpretation of the foreign law by the highest court of the foreign country.

Statement of Facts

While the facts underlying the basic dispute between the parties are complicated,[3] those material to the Questions Presented are simple and straightforward.

In this diversity action commenced in federal court in Delaware, plaintiff claimed *inter alia* that defendants breached an Ecuadorian contract by allegedly underpaying amounts due on production of Ecuadorian crude oil for the last quarter of 1973 and the first two quarters of 1974.

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3 They are described at pages B3-30 of the district court's March 13, 1987 opinion.

Defendants contested the validity of this claim and also urged that it had been resolved in their favor in Ecuador by Ministerial Regulation.[4]

In September 1986, the underpayments claim and another claim were tried without a jury. The district court ruled for plaintiff on the underpayments claim in the principal amount of $365,479. (A23.) It awarded prejudgment interest of $532,608.71, purportedly under Ecuadorian law.[5] (A23.) The court of appeals affirmed. (A25.)

While petitioners believe the findings of liability and damages to be erroneous, the issues do not warrant review by this Court and are not pursued by this petition.

With respect to prejudgment interest, the parties agreed Ecuadorian law governs. Defendants' Ecuadorian law expert, Dr. Miguel Andrade Varea, advised that prejudgment interest on a breach of contract claim is calculated at the legal interest rate in effect on the date the complaint is served and is not segmented and increased by subsequent rate increases. (C8-9.)

Dr. Andrade based his opinion on the provisions of Article 8 of Ecuador's Monetary Board Resolution No. 755 ("Article 8") and the decision of Ecuador's Supreme Court in *Segovia* v. *Acosta*, Judgment No. 341, Third Chamber, November 11, 1977. (Copies of the resolution and the decision are included as part of Appendix C.)

In *Segovia*, plaintiff sought damages and prejudgment interest at the legal rate for breach of contract. (C28.) The intermediate appellate court, reversing the trial court's dismissal of the complaint, awarded plaintiff damages for delay (the Ecuador-

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4 In July, 1984, the underpayments claim was dismissed on this basis. (B3.) But in June, 1985, the district court reopened the matter on the basis of a possible fact issue. (B3.)

5 If the district court had applied Delaware law—which prohibits the segmenting of prejudgment interest (*Rollins Evtl. Services, Inc.* v. *WSMW Indus. Inc.*, 426 A.2d 1363, 1368 (Del. Super. Ct. 1980)—prejudgment interest in this action would have been assessed at the rate of 6%, the rate in effect on the date of the breach (6 Del. C. § 2301(a)), or approximately $234,000.

ian counterpart of prejudgment interest) to be computed at 6% per annum, the rate in effect when the complaint was served. (C30.) During the pendency of the action, Monetary Board Resolution No. 755, providing for a legal rate of interest of 8% per annum, was enacted. (C34.) On appeal to Ecuador's Supreme Court, plaintiff argued that prejudgment interest should be calculated on the basis of the 8% rate in effect on the date of judgment. (*Id.*) The court rejected the argument, holding that service of the complaint fixed the rate of interest at the 6% rate then in effect and that Article 8's subsequent rate increase cannot be applied in a suit brought prior to its effective date. (*Id.*)[6] Thus, the Ecuadorian Supreme Court stated:

> "As to the interest rate, the plaintiffs [sic] demand the payment of the legal amount [of interest] from the citation with the complaint to payment. Said legal interest was 6% per annum at the date on which the complaint was served, for which reason corresponds the payment of the above mentioned interest rate as is set forth in the appealed decision; for, even though the *Junta Monetaria*, by means of *Resolucion* No. 755, published in the *Registro Oficial* No. 728 of January 23, 1975, raises such type of legal interest to 8%, this is only applicable to those acts and contracts [actos y contratos] entered into from the date of its validity, in other words from January 23, 1975, according to what is set forth in Art. 8 of the mentioned resolution." (C34.)

Plaintiff submitted a conclusory letter opinion of its Ecuadorian lawyer, Rene Bustamante Munoz. (Appendix D.) The letter merely recited the legal rates of interest in effect in Ecuador from 1976 and the periods in which they were in effect, without setting out any rationale for segmenting. Indeed, Dr.

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6 The Supreme Court of Ecuador used Article 8 of Resolution No. 755 to preclude the use of the 8% interest rate promulgated in that regulation. Since the operative provisions of Article 8 appear in each of the Monetary Board resolutions issued subsequent to Resolution No. 755, the Ecuadorian Supreme Court's application of Article 8 to preclude segmenting prejudgment interest is equally applicable to preclude the use of the legal interest rates promulgated in the later resolutions.

Bustamante did not opine that prejudgment interest should be segmented. He simply stated as a conclusion: "Therefore, according to these regulations, *it is possible* to claim interest at the legal rate as indemnification of damages for delayed payment or underpayment of royalties or other monetary obligations." (D3; emphasis added).

Nevertheless, the district court dismissed out-of-hand the analysis of Ecuador's Supreme Court in *Segovia* v. *Acosta*, *supra*, on the ground that "judicial decisions are not binding precedent in a civil law jurisdiction such as Ecuador." (B41.) In its place, the district court formulated its own theory for segmenting the interest calculation.[7] The Third Circuit explicitly approved the district court's decision to give no respect to the Supreme Court of Ecuador's interpretation of applicable Ecuadorian law, holding:

> "The [district] court also declined to follow a decision of the Supreme Court of Ecuador, *Segovia* v. *Acosta*, Judgment No. 341, Third Chamber, November 11, 1977, which presented a similar factual situation. The district court observed correctly the lack of precedential effect of judicial decisions in civil law jurisdictions." (A24-25)

REASONS FOR GRANTING THE WRIT

The view that a United States court knows better how to read and interpret a foreign civil law country's statutes than the highest court of the foreign country, is mischievous. It affronts the foreign country and its courts, fosters pointless uncertainty in international transactions, encourages forum shopping and undermines due process of law.

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7 The district court relied in part on an inapplicable statute—Article 7 of the Ecuadorian Civil Code. (B41.) Article 7 (C19), which was not cited by plaintiff's expert, expresses the limited principle that laws do not have retroactive effect and has nothing to do with the issue of whether the rate of prejudgment interest should be fixed or segmented. Phoenix did not attempt to defend the district court's use of Article 7 on appeal.

The command of Rule 44.1, Fed. R. Civ. P., is to treat foreign law as a question of law and to learn it from relevant materials and sources. The teaching of the courts below, however, is essentially "why bother"? For even if a decision of the foreign country's highest court directly on point is found, it is to be disregarded because precedent presumably does not count.[8] Instead, as the courts below would have it, the United States court is free to give the foreign statute any reading it wishes, including one diametrically opposed to that of the foreign country's "Supreme" court.

This is not the procedure employed in determining the law of a sister state pursuant to Full Faith and Credit principles[9] or employed by federal courts in diversity cases where the state is Louisiana, a civil law jurisdiction.[10]

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8 The record included the affidavit of Professor Michael A. Schwind, the Director of the Inter-American Law Institute and the Institute of Comparative Law of New York University School of Law, sworn to July 29, 1983. (Excerpts of this affidavit are set forth in Appendix E.) Professor Schwind explained that Ecuador's Supreme Court decisions, although not technically binding, are considered persuasive and relied upon for their reasoning by lower courts in Ecuador. (E3-4.) *See also Johnson* v. *St. Paul Mercury Insurance Co.*, 256 La. 289, 236 So. 2d 216, 218 (La. 1970) ("Fundamental and elementary principles recognize that certainty and constancy of the law are indispensable to orderly social intercourse, a sound economic climate and a stable government. Certainty is a supreme value in the civil law system to which we are heirs.").

9 United States Constitution, Article IV, § 1, *Sun Oil Co.* v. *Wortman*, _____ U.S. _____, 56 U.S.L.W. 4601, 4605 (U.S. June 14, 1988); *Louisville & Nashville R.R. Co.* v. *Melton*, 218 U.S. 36, 51-52 (1910).

10 *See, e.g., Fischbach and Moore, Inc.* v. *Cajun Elec. Power Coop., Inc.*, 799 F.2d 194, 197-98 (5th Cir. 1986); *Kindle* v. *Cudd Pressure Control, Inc.*, 792 F.2d 507, 510 (5th Cir. 1986), *cert. denied*, _____ U.S. _____, 107 S. Ct. 873 (1987).

It also is not consonant with basic Act of State and Comity principles:

> "[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced—the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.
>
> Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations." *Laker Airways* v. *Sabena Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (footnote omitted). *Accord Hilton* v. *Guyott*, 159 U.S. 113, 164 (1895); *Cunard S.S. Co.* v. *Salem Reefer Services AB*, 773 F.2d 452, 457 (2d Cir. 1985).

On every basis of law, policy and judicial administration, it is essential that federal courts, when determining foreign law, not elevate themselves above the highest court of a foreign country. In light of the approach taken below, regrettably, it is necessary for this Court to exercise its supervisory function to make this emphatically clear.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that a writ of certiorari be granted.

Dated: July 25, 1988

Respectfully submitted,

Milton J. Schubin
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel of Record and Attorney for Petitioners Texaco Petroleum Company, Ecuadorian Gulf Oil Company and Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.)

Of Counsel:

Milton Sherman
Scott M. Berman
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Attorneys for Petitioner Texaco Petroleum Company, Ecuadorian Gulf Oil Company, and Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.)

LAWRENCE R. JERZ
Attorney for Petitioner Texaco Petroleum Company
2000 Westchester Avenue
White Plains, New York 10650

Excerpts from Opinion of the United States Court of Appeals for the Third Circuit (March 30, 1988)

graph 8 appeared to link the Phoenix royalty to the value of the government royalty as it would have been calculated under the 1961 Minas Agreement—the lower West Texas price.

In resolving this apparent conflict, the district court ruled that the Hydrocarbons Law had supplanted the terms of the 1961 Agreement to which paragraph 8 referred. "Once the 1971 Law was promulgated, calculation of government royalties under the 1961 Concession Contract was based no longer on . . . the 1961 Contract, but on . . . the 1971 Law." *Phoenix IV*, 658 F.Supp. at 1080. Thus, because the two-percent royalty was dependent on the amount "which cessionaires must make to the Government," the Hydrocarbons Law altered not only the calculation of the government royalty, but the calculation of Phoenix's royalty as well.

If the ambiguity of the two-percent royalty provisions of the 1965 contract has led to a result defendants had not anticipated, the fault is their own. As authors of the contract, they could have made their terms plain; their failure to do so cannot inure to their benefit. *See John F. Harkins Co. v. Waldinger Corp.*, 796 F.2d 657, 662 n. 2 (3d Cir.1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 939, 93 L.Ed.2d 989 (1987). We agree with the district court that the contract's reference to the amount paid in government royalties necessarily established a benchmark which could be altered by the State through force of law.

We have examined in detail the defendants' other contentions and we are not persuaded. We accept the view of the district court.

B. *Segmented Prejudgment Interest*

On the $365,479 breach of contract judgment, the district court awarded $532,608.71 in prejudgment interest. Defendants challenge the court's calculation of this sum.

The 1965 contract contained no prescribed rate of interest, and the parties agree that Ecuador's legal rate of interest would be applicable. Defendants contend that awards of prejudgment interest under Ecuadorian law accrue from the date of service of process. The district court accepted this starting date and then sought to apply the appropriate rate, a task complicated by

the precipitous rise in interest rates that occurred during the pendency of this litigation.

At the time the complaint was served, the legal rate of interest in Ecuador was 8%. The rate rose dramatically in five stages to 23%, the rate in effect in 1984. Modifications to the interest rates were accomplished by resolutions issued by the Ecuadorian Monetary Board. The resolutions encompassed a wide range of transactions and set varying rates for each, including such diverse items as interest payable on savings passbooks, mortgage bonds, development bonds, obligations of the central and provincial governments, interbank transactions, and various credit operations.

Article 8 of a typical resolution read: "The provisions of the present Regulation shall apply only to the acts and contracts entered into from and including the date it is published in the Registro Official. Therefore, the types of interest rates stipulated in the acts and contracts entered into prior to that date, be they drawn or to be drawn, shall continue in effect until the expiration date agreed upon in the respective act or contract."

The resolutions applied to many different types of transactions and not merely to causes of action in court. The resolutions' language must be read against their background of broad application.

In 1975, the Monetary Board issued Resolution 755 which fixed the legal interest rate at 8%. Defendants aver that this rate should apply to the entire breach of contract judgment. The district court disagreed and applied a segmented interest rate reflecting the five successive increases in the Ecuadorian legal rate.

The court acknowledged the Resolution's statement that the new rates were to apply only to agreements entered into after the date of the Resolution's publication, but held the restriction was limited to contracts providing a stipulated rate of interest. Because the contract here contained no such stipulation, the prejudgment interest rate was increased as the legal rate rose.

In so ruling, the court accepted the views of Phoenix's expert and rejected those of the defendants' experts. The court also declined to follow a decision of the Supreme Court of Ecuador, *Segovia v. Acosta*, Judgment No. 341, Third Chamber,

November 11, 1977, which presented a similar factual situation. The district court observed correctly the lack of precedential effect of judicial decisions in civil law jurisdictions.

We find no reversible error in the district court's ruling on prejudgment interest. The court properly reasoned that if the arrearages had been paid promptly, Phoenix could have taken advantage of the rising legal rates of interest in Ecuador. Pursuant to Resolution 11927, Phoenix was compelled to invest half of its after-tax royalty proceeds in Ecuador and, thus, would surely have profited from the soaring legal rates. "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virgina v. United States*, ____ U.S. ____, ____, 107 S.Ct. 702, 706 n. 2, 93 L.Ed.2d 639 (1987).

IV. *SUMMARY*

We will affirm the judgment in favor of Phoenix for breach of contract arising out of payments due for the last quarter of 1973 and the first two quarters of 1974. On that claim, we will vacate the judgment in favor of the parent Gulf Oil Corporation (now, by change of name, Chevron U.S.A., Inc.) and remand for further proceedings consistent with this opinion. We will affirm the district court's award and calculation of prejudgment interest. Because of the automatic stay under the Bankruptcy Code, we will not enter any dispositive order as to Texaco, Inc. at this time. We will affirm all the remaining judgments in favor of defendants.

Excerpts from Opinion of the United States District Court for the District of Delaware (March 13, 1987)

III. PREJUDGMENT INTEREST.

Phoenix contends it is entitled to prejudgment interest for the breach of contract claims from the date this action was commenced on November 26, 1976. A letter opinion by plaintiff's Ecuadorian law expert, Dr. René Bustamante, serves as the basis for Phoenix's assertions that Ecuadorian law entitles them to prejudgment interest. No other evidence of Ecuadorian law was offered by Phoenix, but the text of Monetary Board Regulation 755 and several sections of the Civil Code submitted by defendant help to clarify some of the statements made in Dr. Bustamante's letter.[39] Defendants also submitted the affidavit of their Ecuadorian expert, Dr. Miguel Andrade Varea, to counter the assertions of Dr. Bustamante.

The initial question of whether prejudgment interest is appropriate for defendant's breach of contract claim does not appear to be in dispute. Defendant's main contention, through its briefing and the Andrade affidavit, is that prejudgment interest is not permitted for the claim of unjust enrichment because the amount of the claim is not fixed until a judgment has been rendered by the court. Dr. Bustamante's letter does not address this issue of whether a definite or sum certain is required with respect to either the breach of contract or the unjust enrichment claims. However, defendant's expert does not contend that the amount due under the breach of contract claims are too uncertain under Ecuadorian law to be subject to prejudgment interest. Dr. Andrade simply concludes that "[p]rejudgment interest in Ecuador is unavailable on the plaintiff's claim for unjust enrichment." Therefore, this Court can only conclude that, to the extent certainty in the amount due is required under Ecuadorian law, that requirement has been satisfied with respect to plaintiff's breach of contract claim, and prejudgment interest is applicable.

Having determined that defendants are liable for prejudgment interest, we must decide at what date the interest begins to

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39 These submissions by the defendant included: Articles 7 and 1611 of the Civil Code of Ecuador, Monetary Board Resolution 755, and Articles 25 and 28 of the Tax Code of Ecuador.

accrue and what rate of interest to apply. The dispute over the date at which interest begins to accrue centers on whether the date of filing the complaint or the date of service of the complaint is controlling. The complaint was filed on November 26, 1976 and served on Gulf Ecuador on December 1, 1976 and on Texaco Ecuador on December 3, 1976.[40]

Defendant's expert, Dr. Andrade, states in his affidavit that if prejudgment interest were to be assessed it would begin to accrue only from the dates the complaint was served on the defendants. Andrade does not refer specifically to the basis for his conclusion. However, it is consistent with the principle that prejudgment interest cannot attach until the debtor is made aware of a definite sum which is due. Plaintiff disputes Dr. Andrade's conclusion but offers no support for its position. Dr. Bustamante's letter does not make any reference at all to a date when prejudgment interest should accrue, nor does he refer to whether the claim must be certain before prejudgment interest can attach. Since there is no evidence in the record to oppose defendant's position, we find that prejudgment interest shall accrue from the date of service.

The parties have not contractually stipulated to any particular rate of interest or formula to compute the interest. Where the rate has not been stipulated by the parties, both experts agree that the legal rate of interest applies. The legal rate of interest in effect in Ecuador at the time the complaint was filed and served was eight percent per annum. Monetary Board Resolution 755, January 16, 1975. Defendants contend that this eight percent interest rate should be applied from the date of accrual to the present. Plaintiff, on the other hand, argues that the legal rate of interest increased five different times since Regulation 755 went into effect in 1975, and that the rate of prejudgment interest should increase as well during those periods. The last change went into effect on December 20, 1984 and

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40 Although the length of time between the dates is not great, the controlling date must be determined in order to properly measure the amount of prejudgment interest due.

increased the legal interest rate to 23 percent.[41] Therefore, the difference in rates asserted by plaintiff and defendant is dramatic.

Dr. Bustamante's letter consists of a somewhat detailed analysis of the rates of interest in the Ecuadorian legal system. Dr. Andrade simply makes a conclusory statement that the rate of interest is to be calculated at a rate of 8 percent from the time the complaint was served. However, Dr. Andrade cites and includes as exhibits to his affidavit Article 7 of the Civil Code and a judicial opinion of the Supreme Court of Justice of Ecuador. *Segoria v. Acosta*, Judgment No. 341, Third Chamber, November 11, 1977. Article 7 of the Civil Code establishes the general principle that a new law shall prevail over a previous law where provisions in the two laws conflict. This provision obviously favors plaintiff's position that the rate of interest should increase with the legal rate.

In the *Segoria* case, a legal rate of 6 percent, the rate in effect at the time the complaint in *Segoria* was served, was applied for the entire period even though Resolution 755 changed the rate of 8 percent two years before the decision was rendered by the Court. The Court based its decision upon language in Article 8 of Regulation 755 which states that the provisions of the "Regulation shall apply only to the acts and contracts entered into from and including the date it is published in the *Registro Oficial*." *Segoria* at 11; Regulation 755, Article 8. However, there are two problems with this analysis which cast doubt on defendants' position. First, judicial decisions are not binding precedent in a civil law jurisdiction such as Ecuador. *Phoenix III* at 10 n. 11 [Available on WESTLAW, DCT database]. Second,

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41 Increases in the legal interest rate in Ecuador as set forth by Dr. Bustamante in his letter opinion of June 11, 1985, were as follows:

1975 Regulation 755, January 25, 1975, 8%
1982 Regulation 1170, January 11, 1982, 15%
1983 Regulation 061, March 19, 1983, 16%
1983 Regulation 125, October 27, 1983, 19%
1984 Regulation 175, June 26, 1984, 21%
1984 Regulation 214, December 20, 1984, 23%

Plaintiff has represented to the Court that no changes in the interest rate have been made since December 20, 1984.

the language of Regulation 755, which is quoted above and cited in *Segoria*, is immediately followed by language which states, "[t]herefore, the types of interest rates *stipulated* in the acts and contracts entered into prior to that date . . . shall continue in effect until the expiration date agreed upon in the respective acts or contracts." Regulation 755 (emphasis added). This language indicates that the new interest rate will not apply to any existing contracts which had already stipulated the interest rate. However, in situations where no interest rate has been agreed upon by the parties, the current legal rate of interest should be held to apply.

For this reason, we find that the rate of prejudgment interest shall begin at 8 percent per annum and increase in accordance with increases in the Ecuadorian legal rate of interest.

IV. LIABILITY OF PARENT CORPORATION.

Phoenix asks the Court to find liability not only on the part of the subsidiaries, Texaco Ecuador and Gulf Ecuador, but on the part of the parent corporations, Texaco and Gulf. Since we have ruled that the subsidiaries did breach the 1965 Contract in their calculation of the two percent payments for the disputed quarters, we must now examine this claim against the parent corporations. Plaintiff advances the theory that liability rests with the parents because the subsidiaries were acting purely as agents of the parent corporations in all matters relevant to this cause of action.

Both parties agree that Delaware law should apply to this question.[42] There are essentially two general theories of liability under which a parent corporation may be held responsible for the obligations of its subsidiaries. Some courts, using the

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42 Judge Schwartz in *Phoenix II* has already held that Ecuadorian law should apply to the substantive issues in this case. However, Judge Schwartz did not address the issue of whether Gulf and Texaco may be held liable for the obligations of their subsidiaries. Because the subsidiaries here are Delaware corporations, and one of the parent corporations, Texaco, is a Delaware corporation, it is appropriate that Delaware law be applied in deciding this issue of parent corporation liability for the activities of its subsidiary. *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil*, 456 F. Supp. 831, 840 (D.Del. 1978).